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## ENVIRONMENTAL PROTECTION

### LAND USE MANAGEMENT AND COMPLIANCE

#### LAND USE REGULATION PROGRAM

##### Freshwater Wetlands Protection Act Rules

##### Coastal Permit Program Rules

Proposed Amendments: N.J.A.C. 7:7-1.10; 7:7A- 1.4, 7.2, and 10.6

Proposed Repeal: N.J.A.C. 7:7A-7.3

Proposed New Rules: N.J.A.C. 7:7A-17

Authorized By: Bradley M. Campbell, Commissioner, Department of  
Environmental Protection

Authority: N.J.S.A. 13:9B-1 et seq., N.J.S.A. 58:10A-1 et seq.,  
N.J.S.A. 12:5-3, N.J.S.A. 13:19-1 et seq., and 13:9A-1 et  
seq.

Calendar reference: See Summary below for explanation of exception to  
calendar requirement

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DEP Docket Number:

Proposal Number: PRN 2001-

**A public hearing on the proposal will be held as follows:**

Wednesday, July 31, 2002, at 10:00 A.M.

DEP Public Hearing Room

401 East State Street

Trenton, New Jersey

Submit written comments by the close of business on September 13, 2002 to:

Janis Hoagland, Esq.

Attn: DEP Docket Number \_\_\_\_\_

Office of Legal Affairs

New Jersey Department of Environmental Protection

P.O. Box 402

Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on 3½ inch diskettes as well as on paper. The Department will be able to upload the comments onto its office automation equipment and will avoid having to retype the

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comments. The Department will use the paper version of the comments to ensure that the uploading was accomplished successfully. Submittal of comments on diskette is not a requirement. The Department prefers Microsoft Word 6.0 or above; however, other word processing software that can also be read or used by Microsoft Word 6.0 is acceptable. MacIntosh formats should not be used.

The proposal can be viewed or downloaded on the Land Use Regulation Program website at <http://www.state.nj.us/dep/landuse>. A copy of the proposal is available by e-mailing the Department at [lurweb@dep.state.nj.us](mailto:lurweb@dep.state.nj.us), or by calling the Department at (609) 984-3444.

The agency proposal follows:

#### Summary

This notice of proposal is excepted from the rulemaking calendar requirement by having a 60-day comment period, pursuant to N.J.A.C. 1:30-3.3(a)5.

In a recent decision by the Appellate Division of the Superior Court in East Cape May Associates v. NJDEP, 343 N.J. Super. 110 (App. Div. 2001), the Court held that the Department was required to adopt rules implementing section 22b of the FWPA (N.J.S.A.13:9B-22b). Section 22b provides the Department the option of modifying its permit action in response to a determination that the permit action would constitute a taking of property without just compensation. This option is an alternative to condemning the property or compensating the owner. These proposed amendments respond to the Court's decision and remand for rulemaking.

The court in East Cape May held that the Department should provide further detail in its rules regarding the standards the Department would apply in determining whether and how to modify its action to avoid a taking. The court stated that the Department's rules need more

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specificity regarding when the Department will reconsider the application of a regulatory requirement to avoid a taking rather than deny approval, and that the Department's rules must be fashioned to balance statutory goals and policies with the property owner's reasonable investment-backed expectations. The court noted that these standards were missing from the Department's freshwater wetlands rules.

While the East Cape May case dealt primarily with freshwater wetlands, the Court also spoke to the issue of takings under the Department's coastal rules. The East Cape May site was located in the coastal zone and was thus subject to regulation under N.J.A.C. 7:7 and 7:7E. However, the site was comprised entirely of freshwater wetlands and freshwater wetland transition areas. Therefore, the Court ruled that N.J.S.A.13:9B-22b (section 22(b)) applied to the site. Prior to the Appellate Division decision in the East Cape May case, the Department had adopted N.J.A.C. 7:7-1.10(c), which allows relaxation of the coastal rules to avoid extraordinary hardship and to provide a minimum beneficial use for a property, consistent with constitutional standards. This coastal rule was intended to address those rare situations where a minimum beneficial economically viable property use would not be provided through strict application of the coastal rules, including rules on beaches, dunes, and threatened and endangered species habitat. The Appellate Division was made aware of the adoption of N.J.A.C. 7:7-1.10(c) during its review of the East Cape May case, and stated in a footnote that N.J.A.C. 7:7-1.10(c) required more detail and standards. Therefore, this proposal includes changes to N.J.A.C. 7:7-1.10(c) as well as changes to the FWPA rules to ensure consistency between the rules.

On January 22, 2002, the Department proposed new rules and amendments to the Coastal Permit Program Rules, N.J.A.C. 7:7, and the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, in response to the above cited court decision (see 34 N.J.R. 390; January 22,

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2002). The January 22, 2002, proposal addressed the issue of takings and also included amendments to the FWPA rules at N.J.A.C. 7:7A-2.4 regarding the method used for the identification of threatened and endangered species habitat. The adoption of the amendments relating to the method for identification of threatened and endangered species habitat is published elsewhere in this issue of the New Jersey Register. As to the takings amendments, the Department has determined not to adopt the rules as proposed on January 22, 2002, but to re-propose modified takings rules at N.J.A.C. 7:7 and N.J.A.C. 7:7A to address concerns and issues raised during the public comment period on that proposal. Following is a brief discussion of the major issues raised with regard to the takings provisions in the prior proposal and how the Department has addressed those issues in today's proposal.

Several commenters expressed concerns and confusion regarding the timing of the process whereby the Department reconsiders and modifies its permit action or inaction concerning a property. The proposed rules have been clarified and, in the case of the FWPA rules, a new subchapter is being proposed to clearly separate the standard permitting process from the proposed process to reconsider or modify a permit decision upon a court finding that the Department's action would constitute a taking of property.

In response to comments received indicating that the previously proposed public notice provisions were inadequate, the Department is proposing that the initiation of the reconsideration process include new notices by the applicant or by the Department in those cases where the Department initiates the reconsideration process on its own.

Commenters on the previous proposal raised concerns that the Department might modify its permit decision regardless of the potential environmental impacts. The rules proposed herein

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require that the Department's reconsideration shall not result in a use that would cause irreversible impacts to certain categories of coastal or freshwater wetland resources.

The following is a section by section description of the proposed amendments and new rules.

## Chapter 7. Coastal Permit Program Rules

### SUBCHAPTER 1 GENERAL PROVISIONS

#### 7:7-1.10 Construction and relaxation of procedures or standards

Existing N.J.A.C. 7:7-1.10 addresses the construction and relaxation of coastal procedural standards (i.e., the permitting process standards in the Coastal Permit Program rules at N.J.A.C. 7:7) and of coastal substantive standards (i.e., the coastal zone management rules at N.J.A.C. 7:7E). Amendments are proposed to the title of N.J.A.C. 7:7-1.10 and at subsection (c) to more appropriately describe the process undertaken with regard to the substantive standards at N.J.A.C. 7:7E as a reconsideration of the application of those standards. The reconsideration process will be undertaken only after a permit decision has been made under the rules as strictly applied, any administrative and/or judicial appeals of the permit decision have been concluded, and a takings actions has been filed in court. The Department may initiate the reconsideration at its discretion any time after the property owner has filed a takings complaint in court or it may wait until the court issues a determination that the permit decision would constitute a taking. A property owner, however, can request that the Department undertake a reconsideration only after the court has made its determination that the permit decision would constitute a taking. This is to ensure that property owners pursue standard administrative remedies, and do not prematurely file

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takings litigation or requests for reconsideration based on takings concerns, while applications under rules as strictly applied remain under review or key takings issues remain undecided.

Further, the Department anticipates that generally, the projects it will be reviewing under the proposed reconsideration process will reduce or modify the project that was the subject of the original Department permit decision. The Department will seek information to determine the impacts of potentially permitting a minimum beneficial economically viable use for the property, not the entire project for which the permit decision was already issued.

The Department proposes to amend the definition for "property as a whole" as used and defined at existing N.J.A.C. 7:7-1.10(e)2, and to move it into the definitions section of the coastal permitting rules at N.J.A.C. 7:7-1.3.. The existing definition states that the property as a whole means "all property that was assembled as one investment or to further one development plan." However, the proposed definition does not include the words "that was," because they imply that the property as a whole includes only properties assembled at one point in the past, whereas the property as a whole also includes any properties added on over time. For example, if a person bought one lot in 1981, and then acquired an adjacent lot in 1982, the two lots together would constitute the property as a whole (assuming all other aspects of the definition also apply). The proposed definition is also amended to explicitly state that it will be applied based upon existing legal precedent at the time of the reconsideration.

Existing subsections (d) and (e) are proposed for deletion. The substance of existing N.J.A.C. 7:7-1.10(e) is proposed to be relocated at N.J.A.C. 7:7-1.10(j), which is summarized later in this document. Existing subsection (d), which describes the timing for a request for relaxation of substantive standards, is proposed for deletion since proposed subsection (c)

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contains the new timing requirements relating to the reconsideration of one or more of the substantive standards in the rules on Coastal Zone Management.

Proposed new N.J.A.C. 7:7-1.10(d) sets forth three factors the Department will consider in determining whether to reconsider the application of a substantive standard of N.J.A.C. 7:7E, each of which is described in a separate subsection summarized below:

- The property owner's investments in the property, and the reasonableness of these investments;
- Potential uses for the property which would be minimum beneficial economically viable uses; and
- The likely environmental impacts of any potential minimum beneficial economically viable uses of the property.

Proposed new N.J.A.C. 7:7-1.10(e) sets forth the five factors the Department will consider in determining whether investments made in the property were reasonable. These factors are based on legal precedent and the Department's experience in past takings cases. Factors one and two require that the investment must have actually been incurred in pursuit of a legal and practically possible development on the specific site in question. Planned investments will not be included. For example, if a property is undevelopable under local zoning, and necessary utilities are unavailable to the site, substantial investments made in pursuing a major development might not be considered reasonable. This provision ensures that a property owner has exercised due diligence in investigating development constraints prior to investing in the project, and prevents a property owner who did not exercise due diligence or adequately investigate existing constraints prior to making an investment to benefit at the public's expense.



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Third, the action for which the funds were expended must have been lawful at the time of the expenditure. For example, if the property owner violated Department rules by starting construction without the proper permits, the cost of defending against the Department's enforcement action would not be considered a reasonable investment.

Fourth, the investment must relate to the specific property that is the subject of the coastal permit application and not to another property.

Last, the proposed rule allows the consideration of any other factor related to the reasonableness of the investment and/or the proposed use of the property. The situations in which takings issues arise are varied, and can involve a wide variety of types of ownership, property histories, site conditions, and other relevant factors. This provision will allow the Department to consider any unusual factors that might be identified, if they are relevant to the reasonableness of the investment.

Proposed N.J.A.C. 7:7-1.10(f) addresses whether reconsideration of the application of a substantive standard would provide the property owner with a minimum beneficial economically viable use for the property as a whole. The proposed rule provides that, merely because a use diminishes the value or marketability of a property, does not result in a profit, or does not allow the property owner to recoup all investments in the property, this does not mean it is not a minimum beneficial economically viable use. The purpose of a reconsideration of standards is to ensure a minimum beneficial economically viable use of the property in accordance with constitutional standards and legal precedent, not to provide a specific rate of return desired by a property owner.

Proposed N.J.A.C. 7:7-1.10(g) sets forth the factors the Department will consider in evaluating the potential environmental impacts that might be caused by any minimum beneficial

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economically viable uses identified under (f), and how that harm might be minimized or mitigated. In determining whether to reconsider the application of a substantive standard, the Department must balance the economic interests of property owners against the environmental protection mandate of the coastal protection statutes including, CAFRA, N.J.S.A. 13:19-1 et seq., the Waterfront Development Law, N.J.S.A. 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.

Proposed N.J.A.C. 7:7-1.10(h) states that the Department shall not approve a project through this reconsideration process that would result in irreversible impacts to certain categories of coastal resources. If a possible minimum beneficial economically viable use would cause any of the environmental impacts that cannot be mitigated, as described in this subsection, it is inconsistent with the policies and goals of the coastal protection statutes.

Proposed new N.J.A.C. 7:7-1.10(i) addresses when a request for reconsideration of the application of the substantive standards of N.J.A.C. 7:7E may be submitted. Under the existing rules, such a request could be submitted with a permit application (although the Department would not decide on the request until the application was decided on), or after receiving notice of a Department decision on an application. Under the proposed rule, a property owner may request a reconsideration only after any appeals of the final permit decision under the rules as strictly applied have been concluded and after a court determination that the Department's issuance, modification or denial of a coastal permit without reconsideration would result in a taking of property without just compensation. This provision will ensure that other processes that may affect whether reconsideration is in fact required have been completed.

Proposed N.J.A.C. 7:7-1.10(j) is recodified with amendments from existing N.J.A.C. 7:7-1.10(e), and sets forth the information required for a reconsideration. Several new requirements

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are being proposed. The proposed rule requires the applicant to complete a LURP application form, indicating that he or she is requesting a reconsideration and the type of permit being requested. The applicant will be asked to provide new notice, so that the public will know that a request has been made and to allow public participation in the reconsideration process. The Department is requiring an environmental impact statement or compliance statement to address the areas of environmental concern that may be affected by the proposed minimum beneficial economically viable use. While it is likely that this documentation will have been submitted with the prior permit application, the Department anticipates that the minimum beneficial economically viable use will not be the project that was previously considered. Therefore, new documentation specifically addressing the project for reconsideration must be submitted.

To ensure that all property owners within 200 feet of the property have been identified and provided notice, N.J.A.C. 7:7-1.10(j)8iii requires submittal of a municipally certified list of all property owners within 200 feet of the property. This will make the reconsideration request submittal requirements consistent with other existing coastal permit application requirements.

At N.J.A.C. 7:7-1.10(j)9, the period for which the property owner must keep offers for sale of the property open is proposed to be shortened to 90 calendar days. The Department believes that this amount of time will be sufficient to allow an interested party to come forward. The Department does not expect a transaction to be completed, but does expect that a prospective buyer will be able to commit to purchase the property in this timeframe.

Proposed N.J.A.C. 7:7-1.10(j)10 requires submittal of a copy of a court takings decision, since this will qualify an applicant to request initiation of the reconsideration process.

N.J.A.C. 7:7-1.10(j)11 requires that the request for reconsideration include documentation that the property owner has concluded all administrative and judicial appeals of

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the Department's decision on the coastal permit application. For example, if an appeal is filed in the OAL, the reconsideration request would be considered complete when it includes a copy of the Commissioner's final decision after conclusion of the OAL proceedings. However, if an appeal of the Commissioner's final decision were filed in the Appellate Division, the request would not be complete until final disposition of that appeal.

Proposed new N.J.A.C. 7:7-1.10(k) establishes procedures for the Department to follow in those cases when it reconsiders the application of one or more of the substantive standards of N.J.A.C. 7:7E on its own initiative. The Department needs the option to initiate the reconsideration of an application on its own in those cases when the Court has made a finding of taking without compensation, the owner is not interested in a reconsideration and declines to apply, or the Department is not interested or able to purchase the subject property. When the Department initiates the reconsideration, in order to include the public early in the reconsideration process, the Department proposes to publish notice in the DEP Bulletin, with a 15-day comment period from the date of publication, provide notice to the township clerk, planning board and environmental commission, as required under N.J.A.C. 7:7-4.2(a)3, to the Pinelands Commission, when appropriate, and to each commenter who had submitted comments on the prior application that is the subject of the reconsideration. The intent of the notice is to make the public aware that the reconsideration process is under way and to gather preliminary comments. Since the Department will be initiating the reconsideration, the notice and comment period might result in the receipt of information additional to that which was originally submitted by the permit applicant for the project that is now the subject of the takings claim.

Proposed new N.J.A.C. 7:7-1.10(l) provides that if the Department reconsiders the application of the substantive standards of N.J.A.C. 7:7E and as a result decides to approve a

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development, the Department shall provide the same notice as it provided upon initiation of the reconsideration, and will provide the public with a 30-day comment period to review the proposed development.

Proposed new N.J.A.C. 7:7-1.10(m) sets forth the timeframe in which the Department must take action on a request for a reconsideration. When an applicant requests a reconsideration, the Department proposes a 180-day review period counted from the date the request is complete for reconsideration. When initiated by the Department, the 180-day review period will be counted from the initial notice of reconsideration published in the DEP Bulletin. The Department estimates that the reconsideration will require 180 days for review since it may need to hire experts to help in its determination of the minimum beneficial economically viable use for the site.

Proposed new (n) provides that any development approved based on a reconsideration of substantive standards of N.J.A.C. 7:7E must meet at least two requirements. It must be the minimum relief necessary to enable the property owner to realize a minimum beneficial economically viable use of the property as a whole, consistent with constitutional standards, and any portion of the property as a whole that is not authorized for development must be protected from future development through a conservation restriction. These limits, relocated from existing N.J.A.C. 7:7-1.10(c) 6 and 7, will ensure that the provisions for reconsideration of substantive standards will be strictly limited and will not result in undue environmental impacts.

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## N.J.A.C. 7:7A FRESHWATER WETLANDS PROTECTION ACT RULES

### SUBCHAPTER 1 GENERAL INFORMATION

#### 7:7A-1.4 Definitions

A definition is proposed for "property as a whole." This term is used in the takings provisions of the existing rules and is defined in the existing rules at N.J.A.C. 7:7A-7.3(d). The definition is being moved to the definitions section at N.J.A.C. 7:7A-1.4. In addition, minor clarifying amendments are proposed, including a change in the first sentence. The first sentence of the existing definition states that the property as a whole means "all property that was assembled as one investment or to further one development plan." However, the proposed definition does not include the words "that was," because they imply that the property as a whole includes only properties assembled at one point in the past, whereas the property as a whole also includes any properties added on over time. For example, if a person bought one lot in 1981, and then acquired an adjacent lot in 1982, the two lots together would constitute the property as a whole (assuming all other aspects of the definition also apply). The proposed definition is also amended to explicitly state that it will be applied based upon existing legal precedent at the time of the reconsideration.

### SUBCHAPTER 7 INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

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#### 7:7A-7.2 Standard requirements for all individual permits

Existing N.J.A.C. 7:7A-7.2(b)12viii, which cross references takings provisions at existing N.J.A.C. 7:7A-7.3, is proposed for deletion, since the reconsideration provisions for Department actions upon the finding of a taking have been relocated to N.J.A.C. 7:7A-17.

Proposed new N.J.A.C. 7:7A-7.2(c)3 emphasizes that the Department may consider the acquisition history of a property, and the property owner's investment in the property, when considering costs in the context of what is a practicable alternative. This will ensure that the Department can obtain complete information on this key issue before making a final decision on an individual permit.

Existing N.J.A.C. 7:7A-7.3, which details the information that must be submitted as part of an application when the applicant wishes to assert that a taking will occur, is proposed for repeal. As explained above with regard to the takings provisions proposed for the coastal rules at N.J.A.C. 7:7-1.10, the Department will not undertake a takings analysis in advance of a claim for a takings being filed in court. However, much of the information required under existing N.J.A.C. 7:7A-7.3 relates to cost, which is a legitimate and inherent consideration for the Department to evaluate when considering whether there is a practicable alternative to the project as proposed. Therefore, some of the substance of the provision is relocated in the subchapter addressing application contents at N.J.A.C. 7:7A-10.6(b), except, as noted, the definition of "property as a whole" is relocated in the definitions section at N.J.A.C. 7:7A-1.4.

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## SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURE

### 7:7A-10.5 Additional application requirements for an individual transition area waiver

Proposed new N.J.A.C. 7:7A-10.5(b) sets forth a requirement that an applicant for a hardship transition area waiver submit the information required for an individual freshwater wetlands permit regarding the acquisition history of a property. This information will assist the Department in evaluating whether the applicant meets the requirements at N.J.A.C. 7:7A-10.5(a) for a hardship waiver.

### 7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

The provisions located in the existing rules at N.J.A.C. 7:7A-7.3(e)1 through 6, detailing information that must be submitted to assert that a Department permitting action could cause a taking as a part of a public interest review, are proposed to be deleted. Provisions describing the requirements for an alternatives analysis at existing N.J.A.C. 7:7A-10.6(a)7 are proposed for deletion because their substance is included in proposed new N.J.A.C. 7:7A-10.6(b)1.

Proposed new N.J.A.C. 7:7A-10.6(b) sets forth the types of information that will be required by the individual permit application checklist for the portion of the application that addresses the alternatives analysis. This information is important to the evaluation of whether there are practicable alternatives to a proposed project, and is relevant to the question of whether an alternative is "capable of being carried out after taking into consideration cost, existing



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technology, and logistics in light of overall project purposes," in accordance with N.J.A.C. 7:7A-7.2(c)1. However, rather than detail all of the information, the rule follows the scheme found in the rest of the chapter and describes the broad categories of information that will be required. The application checklist will then require only as much information as is needed for the particular type of application. For example, an individual permit application for a single family home would, in all likelihood, not require the same amount of information relating to alternatives as would be needed for an application for a 100 unit development.

## SUBCHAPTER 17 RECONSIDERATION BY DEPARTMENT OF ITS ACTION OR INACTION CONCERNING A PERMIT

Proposed new N.J.A.C. 7:7A-17 contains provisions relating to takings and N.J.S.A. 13:9B-22b. These are similar to provisions found at existing N.J.A.C. 7:7A-7.3, but differ in two significant ways. First, the proposed provisions are much more detailed, as described below. Second, the provisions have been relocated from the public interest test to a separate subchapter. The proposed rules are similar to those being proposed in the coastal rules at N.J.A.C. 7:7-1.10. However, the terminology used at N.J.A.C. 7:7A-17 reflects the fact that the FWPA speaks of the Department modifying its action or inaction, so the reconsideration process described in subchapter 17 uses that terminology. The process proposed in the coastal rules at N.J.A.C. 7:7-1.10 refers to a reconsideration by the Department of the application of the substantive standards in the Coastal Zone Management rules at N.J.A.C. 7:7E. However, the concepts and process for both the coastal rules and the freshwater wetland rules are substantially the same.

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#### 7:7A-17.1 Reconsideration by Department of its action or inaction concerning a permit

Proposed new N.J.A.C. 7:7A-17.1(a) sets forth the options the Department may employ, as provided in the FWPA at N.J.S.A.13:9B-22b. The Department may compensate the property owner, condemn the property, or reconsider and modify its previous action in order to minimize the detrimental effect to the value of the property. The Department may determine to reconsider and modify its action by approving some development on the property, and in addition, compensate the owner as appropriate in exchange for an interest in the property.

Proposed new N.J.A.C. 7:7A-17.1(b) sets forth the conditions that must be met before the Department will decide to reconsider and modify its action or inaction concerning a permit. As under the process proposed for the coastal rules at N.J.A.C. 7:7-1.10, the reconsideration by the Department of its action or inaction concerning a permit under this subchapter cannot be undertaken until after an individual freshwater wetlands permit decision has been made under the rules as strictly applied, any administrative or judicial appeals of the decision have been concluded, and a takings action has been filed in court. The Department may initiate the reconsideration at its discretion any time after the property owner has filed a takings complaint or it may wait until the court issues a determination that the permit decision would be a taking. A property owner, however, can request that the Department undertake a reconsideration only after the court has made its determination that the permit decision would constitute a taking. This is intended to ensure that property owners pursue standard administrative remedies, and do not prematurely file takings litigation or requests for reconsideration based on takings concerns, while applications under rules as strictly applied remain under review or key takings issues remain undecided.

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The Department needs the option to undertake the reconsideration of its permit action or inaction on its own initiative in those cases when a takings claim has been filed and the owner is not interested in a reconsideration and declines to apply, or the Department is not interested or able to purchase the subject property.

Proposed new N.J.A.C. 7:7A-17.1(c), which sets forth the factors the Department will consider in determining whether and how to modify its action, is similar to proposed N.J.A.C. 7:7-1.10(d). The factors are:

- The property owner's investments in the property, and the reasonableness of these investments;
- Potential uses for the property which would be minimum beneficial economically viable uses; and
- The likely environmental impacts of any potential minimum beneficial economically viable uses of the property.

Proposed N.J.A.C. 7:7A-17.1(d), which sets forth the factors the Department will consider in determining whether investments made in the property were reasonable, is essentially identical to proposed N.J.A.C. 7:7-1.10(e), which is summarized above.

Proposed N.J.A.C. 7:7A-17.1(e), which addresses whether modifying the Department's permit action would provide the property owner with an economically viable use for the property as a whole, is identical to proposed N.J.A.C. 7:7-1.10(f) which is summarized above.

Proposed N.J.A.C. 7:7A-17.1(f) sets forth the factors the Department will consider in evaluating the potential environmental harm that might be caused by any minimum beneficial economically viable uses identified under N.J.A.C. 7:7A-17.1(e), and how that harm might be minimized or mitigated. In determining whether and/or how to modify its action, the

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Department must balance the economic interests of property owners against the environmental protection mandate of the FWPA. Proposed N.J.A.C. 7:7A-17.1(f) focuses on potential impacts to the freshwater wetland resource, while proposed N.J.A.C. 7:7-1.10(g), addresses environmental impacts to coastal resources, as described above.

Proposed new N.J.A.C. 7:7A-17.1(g) declares that the Department will not approve a project under the reconsideration process that would cause irreversible impacts to certain categories of freshwater wetland resources because such an approval would be inconsistent with the policies and goals of the FWPA. This provision is substantively the same as proposed N.J.A.C. 7:7-1.10(h), described above.

Proposed new N.J.A.C. 7:7A-17.1(h) establishes that an applicant may request that the Department reconsider and modify its action or inaction concerning a permit only after the conclusion of any appeals of the final permit decision made under the rules as strictly applied have been concluded and after a court determines that the individual freshwater wetlands permit decision would result in a taking of property without just compensation. This provision will ensure that other processes that may affect whether reconsideration is in fact required have been completed.

Proposed new N.J.A.C. 7:7A-17.1(i) sets forth the required contents of a request for the Department to reconsider and modify its action or inaction concerning a permit. This includes the information required under existing N.J.A.C. 7:7A-7.3(e). Several new requirements are being proposed. The proposed rule requires the property owner to complete a LURP application form, and to provide new notice, to inform the public that the request is being made and to allow public participation in the reconsideration process. The Department is requiring that the owner consent to an onsite inspection, so that in the course of the reconsideration, the Department and

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its experts have the right to inspect the property if needed, to assess potential impacts from the proposed minimum beneficial economically viable uses.

To ensure that all property owners within 200 feet of the property have been identified and provided notice, proposed N.J.A.C. 7:7A-17.1(i)7iii requires submittal of a municipally certified list of all property owners within 200 feet of the property. In addition, the requirement that the property owner keep offers for sale of the property open for 180 days is proposed to be reduced to 90 days at N.J.A.C. 7:7A-17.1(i)8i. The Department believes that this amount of time will be sufficient to allow an interested party to come forward. The Department does not expect a transaction to be completed, but does expect that a prospective buyer will be able to commit to purchase the property in this timeframe.

A new provision, N.J.A.C. 7:7A-17.1(i)13, requires submittal of a copy of a court determination that the Department's permit decision would result in a taking. This information is required since this finding qualifies the applicant to request a reconsideration under this subchapter.

A requirement is added at N.J.A.C. 7:7A-17.1(i)14 that the request include documentation that the property owner has concluded all administrative and judicial appeals of the Department's decision on the freshwater wetlands individual permit application. For example, if an appeal is filed in the OAL, the request for reconsideration and modification of a Department permit action would be considered complete only if, in addition to the other submittals required, it includes a copy of the Commissioner's final decision concluding the OAL proceedings. However, if an appeal of the Commissioner's final decision were filed in the Appellate Division, the request for reconsideration would not be complete until final disposition of that appeal.

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Proposed N.J.A.C. 7:7A-17.1(i)15 requests basic information regarding the person(s) preparing the request for reconsideration so that the Department may contact and consult with that person as needed.

Proposed new N.J.A.C. 7:7A-17.1(j) provides that, in those cases where the Department decides to reconsider and modify its action concerning a permit on its own initiative, it shall provide notice, in the same manner and to the same parties as described at N.J.A.C. 7:7-1.10(k), above.

Proposed new N.J.A.C. 7:7A-17.1(k) provides that if the Department determines that it will modify its permit action, a new notice and opportunity for public comment will be provided in the DEP Bulletin. This provision is the same as that described above at N.J.A.C. 7:7-1.10(l).

Proposed new N.J.A.C. 7:7A-17.1(l) establishes a 180-day review period for the Department to make a determination counted from the date the request is complete for reconsideration. When initiated by the Department, the 180-day review period will be counted from the initial notice of reconsideration published in the DEP Bulletin. As described above, at N.J.A.C. 7:7-1.10(m), the Department estimates that the reconsideration will require this amount of time for a thorough evaluation.

Proposed new N.J.A.C. 7:7A-17.1(m) is essentially identical to N.J.A.C. 7:7-1.10(n) and provides that any development allowed based on a reconsideration and modification of a permit action or inaction under this section must meet two minimum requirements. It must be the minimum relief necessary to enable the property owner to realize a minimum beneficial economically viable use of the property as a whole, consistent with constitutional standards, and any portion of the property as a whole that is not authorized for development must be protected from future development through a conservation restriction. These provisions ensure that any

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development resulting from a reconsideration and modification of a permit action or inaction will be strictly limited and will not result in undue environmental impacts.

### Social Impact

The social impact of the proposed amendments to the coastal and wetlands rules that allow the Department to reconsider its permitting actions so as to minimize the detrimental effect to the value of the property where a takings would be determined will be positive. The amendments provide a logical and more predictable process in both the coastal and the freshwater wetlands rules for addressing a court's determination that a Department action will result in an unconstitutional taking or impermissible restriction on development of property. The proposal provides to the public detail concerning the process the Department will follow in evaluating such findings, and the standards the Department will apply in determining whether and how to modify a Department action to ameliorate a taking.

The proposed amendments to the application requirements at N.J.A.C. 7:7A-10.5 and 10.6 will have a positive social impact. These amendments allow the Department to require information regarding the cost and acquisition history of a property as part of an individual freshwater wetlands permit application. This additional information will enable the Department to better evaluate possible alternatives to proposed projects, resulting in a better decision making process overall.

### Economic Impact

The proposed amendments to both the coastal and FWPA rules are expected to have both positive and negative economic impacts. In the short term, in order for an applicant to assert a

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takings claim for reconsideration of a Department permit action, the applicant will have to obtain a court finding of taking, and this will result in costs to the applicant for hiring an attorney and filing suit. In the long term, however, once the applicant has such a finding by a court, the proposed amendments will have a positive economic impact since they establish a procedure for the applicant to request a reconsideration of a permit for a minimum beneficial economically viable use, an offer by the Department to compensate the property owner for a denied project, or a combination of the two. While this process was always available to applicants under the Freshwater Wetlands Protection Act, and had been previously incorporated into the hardship provisions of the Coastal Permit Program rules, the proposed new rules standardize the procedures necessary to take advantage of this option. Consequently, the potential long term positive economic impacts should balance the potential short-term negative impacts.

### Environmental Impact

The proposed amendments, in both the coastal and freshwater wetlands rules, are not likely to have a direct environmental impact since the amendments are intended to provide a method for identifying viable property uses with minimized environmental impacts. There may be a positive environmental impact in those cases where a finding of takings by a court



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results in the purchase of the property by a willing buyer. However, even in those cases where the Department reconsiders and modifies its permit action to allow some development, the development shall have minimal environmental impacts in compliance with CAFRA, N.J.S.A. 13:19-1 et seq., the Waterfront Development Law, N.J.S.A 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq. and/or the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.).

#### Federal Standards Analysis

Executive Order No. 27 (1994) and P.L. 1995, c.65 (amending N.J.S.A. 52:14B-1 et seq.) require that State agencies that adopt, re-adopt or amend State rules include a statement as to whether the rule contains any standards or requirements which exceed those imposed by Federal law.

The proposed amendments to the Coastal Permit Program Rules do not exceed Federal law because there is no corresponding Federal law. The Federal Coastal Zone Management Act (P.L. 92-583) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. These guidelines are found at 15 C.F.R. 923. The guidelines do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. They simply provide a planning and management process, without

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establishing development standards for development in the coastal area. Therefore, the proposed amendments do not exceed any federal standards or requirements.

The proposed amendments to the Freshwater Wetlands Protection Act rules are consistent with Federal Executive Order (E.O.) 12360 (1988), which applies to the Section 404 permitting process. This E.O. requires Federal agencies to evaluate the potential for their permitting actions to cause unintended takings, and to ensure that their actions restricting property use do so only to the extent necessary, consistent with Federal legal authority. The Army Corps of Engineers (ACOE), when implementing this order, has the authority to permit a minimal project, regardless of the project that was presented to it by the applicant. While the Department is required to review, and approve or deny the project that is presented to it for a permit, the proposed amendments will enable the Department to reconsider its action and evaluate a project that would provide a minimum beneficial economically viable use in those cases where a takings complaint has been filed with the court or a court has made a determination of taking without just compensation. The proposed new application requirements for practicable alternatives may appear to exceed the ACOE's application requirements at 33 CFR 325.1(e) because the Department is explicitly enumerating the types of information that are required in order to review an application. However, both agencies require the same type of information to thoroughly assess alternatives and to make an informed decision on an application. The information relating to costs and investment should be readily available to applicants and therefore, will not require professional assistance for collection or submittal. The benefit from providing this information will be substantial, since if the applicant successfully demonstrates the lack of alternatives, and can demonstrate compliance with the remainder of the standards for an individual permit, the

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Department will be able to issue a permit for the applicant's project, without the need for further appeals or reconsideration.

#### Jobs Impact

The Department does not anticipate that the proposed amendments will have any noticeable effect on employment, including the generation or loss of jobs. The amendments addressing reconsideration of an action, when a takings complaint has been filed with the court or upon a Court's determination that the Department's action constitutes a taking without just compensation, are not likely to affect the amount of development in New Jersey. Thus, the Department believes that any impact of these proposed amendments on employment will be negligible.

#### Agriculture Industry Impact

Since ongoing farming, ranching and silviculture are exempt from the rules, and few new farms are being established in New Jersey, the proposed amendments will affect development activities only and are not likely to have any measurable effect on agriculture.

#### Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that, although these amendments will affect a fairly small number of persons, some of those builders and property owners that may be affected by the proposed amendments are "small businesses" as defined by the Regulatory Flexibility Act. The FWPA rules apply to any person owning property containing freshwater wetlands, State open waters and/or transition areas, who intends to engage in a regulated activity. It is impossible for

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the Department to estimate the exact number of small businesses that own property that will be affected by the proposed amendments.

The Department has determined that the proposed amendments will not impose additional reporting or recordkeeping requirements on small businesses. The reporting, recordkeeping, and other compliance requirements imposed on small businesses under the takings amendments are the same as those for other regulated entities. These include the requirement to apply for a Coastal and/or Individual freshwater wetlands permit under the standards as strictly applied, to complete all administrative and judicial appeals, to file a takings complaint with a court if still dissatisfied, and to file a written request for reconsideration by the Department. The applicant will likely need a consultant, engineer and/or attorney to complete all of the necessary steps. While the cost may be high to hire the necessary professionals to complete the process described by the amendments, the Department believes that this expense is appropriate. The result of successful completion of a request for reconsideration could be approval of a project providing the applicant with a minimum beneficial economically viable use of a property and/or the purchase of the property by the State of New Jersey using public tax monies. Therefore, because the Department must carefully consider the use of tax payer money, the values and functions of wetlands are important to all persons, and these proposed amendments are necessary to maintain appropriate freshwater wetlands protection and to retain assumption of the Federal 404 program, no lesser requirements for small businesses are provided.

[Smart Growth Impact](#)

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The Coastal Permit Program Rules and Freshwater Wetlands Protection Act Regulations overall are consistent with the law and policy of New Jersey to promote smart growth and to reduce the negative effects of sprawl and dis-investments in older communities, as described in Executive Order No. 4 (2002). Both sets of rules discourage incompatible development of environmentally sensitive features, which are vital to the health and well-being of the present and future citizens of the State. The proposed new and amended rules which describe the process of reconsideration by the Department upon the filing of a takings complaint with the court or a finding of takings by a Court, is consistent with smart growth policy since it gives the applicant the opportunity to request, and the Department the opportunity to consider whether a property contains features that are so environmentally sensitive that they merit strict protection through purchase and preservation, or whether due to location, circumstance or resource type, there is some minimum beneficial economically viable use that can be permitted on the property. Therefore, the proposed rules and amendments comport with the goals of smart growth and implementation of the State Plan described in Executive Order No.4.

## N.J.A.C. 7:7 COASTAL PERMIT PROGRAM RULES

### SUBCHAPTER 1 GENERAL PROVISIONS

#### 7:7-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

...

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“Property as a whole” means all property assembled as one investment or to further one development plan. The property as a whole may include more than one municipal tax block or lot. The property as a whole may also include blocks or lots that were previously sold or developed, if those blocks or lots and the remaining unsold or undeveloped blocks or lots were part of one investment or development plan. In determining the property as a whole in a particular case, the Department shall consider existing legal precedent regarding what constitutes “property as a whole” at the time of the determination.

...

7:7-1.10 Construction [and]; relaxation of procedures [or] and reconsideration of application of substantive standards

(a) - (b) (No change.)

(c) [In making any permit decision under this chapter, the Department may relax the application of one or more of the substantive standards in the rules on Coastal Zone Management at N.J.A.C.

7:7E. The Department may relax the application of the standards in N.J.A.C. 7:7E only if the applicant demonstrates that an extraordinary hardship exists. An extraordinary hardship is deemed to exist only if the applicant demonstrates to the Department's satisfaction that:

1. The strict application of any standard(s) in N.J.A.C. 7:7E would prevent a property owner from realizing a minimum beneficial use of his or her property as a whole, in accordance with constitutional standards, and this does not result from an action or inaction of that property

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owner or an entity controlled by that property owner. For the purposes of this paragraph, the property as a whole is all property that was assembled as one investment or to further one development plan, and may include more than one municipal tax lot. The property as a whole may also include lots that were previously sold or developed, if those lots were part of one investment or one development plan;

2. The proposed use minimizes impacts to the Special Areas described at N.J.A.C. 7:7E-3 to the maximum extent practicable ;

3. The proposed use will not jeopardize a threatened or endangered species;

4. The property has been offered for sale as required under (e)4 below;

5. The proposed use will not substantially impair coastal resources;

6. The proposed use is the minimum relief necessary to enable the property owner to realize a minimum beneficial use of the property as a whole, consistent with constitutional standards; and

7. Any part of the subject property that the Department does not allow to be developed through relaxation of the substantive standards of N.J.A.C. 7:7E under this subsection shall be protected from any future development by a recorded conservation restriction to prohibit its use in the

future for regulated activities.] The Department may reconsider the application of one or more of the substantive standards in the rules on Coastal Zone Management at N.J.A.C. 7:7E, provided:

1. The Department has rendered a decision on a permit application under the substantive standards at N.J.A.C. 7:7E as strictly applied;

2. All administrative and judicial appeals of the permit decision have been concluded; and

3. Either of the following requirements is met:

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i. A court has determined that the issuance, modification, or denial of a coastal permit would

constitute a taking of property, and the property owner thereupon submits a request for a

reconsideration of the application of a substantive standard of N.J.A.C. 7:7E; or

ii. A takings complaint has been filed with the court or the court has determined that the

issuance, modification or denial of a coastal permit would constitute a taking of property, and the

Department initiates the reconsideration.

[(d) An applicant may request a relaxation of a substantive standard(s) in N.J.A.C. 7:7E under (c) above either:

1. At the same time that the applicant submits a permit application. However, the Department will not make a decision on the request until after the Department renders a decision on the permit application; or
2. After receiving notice of a Department decision on a permit application. Unless the Department grants an extension of time for submitting such a request, the applicant shall submit a request for relaxation of N.J.A.C. 7:7E standards within the time frame set forth in N.J.A.C. 7:7-5.1(a) for an adjudicatory hearing request.

(e) A request for the relaxation of N.J.A.C. 7:7E standards under (c) above shall include the following:

1. Development plans showing the project that is proposed in order to provide a minimum beneficial use;



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2. Document(s) showing when the property as a whole was acquired and the purchase price of the property as a whole and the amount and nature of any other expenditures made to maintain and/or develop the property as a whole;
3. The language of a proposed conservation restriction that meets the requirements of (c)7 above;
4. Documentation that the property has been offered for sale, in a letter provided by the Department, via certified mail, at a fair market value, to all owners of real property within 200 feet of the property, and to the land conservancies, environmental organizations, and government agencies on a list supplied by the Department. The applicant shall submit any response it receives to the offer for sale to the Department within 15 days of receipt by the applicant. The written offer of sale shall:
  - i. Indicate that the offer is open for a period of at least 180 calendar days;
  - ii. Include a copy of a fair market value appraisal, performed by a State-licensed appraiser, that assumes that a minimum beneficial use of the property would be allowed;
  - iii. If applicable, include full disclosure that the property is comprised of any of the Special Areas described at N.J.A.C. 7:7E-3; and
  - iv. Indicate that a relation of N.J.A.C. 7:7E standards to avoid extraordinary hardship and allow development of the property has been requested under this section; and
5. Document(s) and a detailed narrative demonstrating compliance with (c)above.]

(d) In making the determination to reconsider application of a substantive standard of N.J.A.C.

7:7E under (c) above, the Department shall prepare a written analysis that evaluates three factors:

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1. The investments the property owner made in the property that is the subject of the coastal permit application and whether the investments were reasonable, in accordance with (e) below;
2. The minimum beneficial economically viable use of the property, in accordance with (f) below; and
3. The environmental impacts of the minimum beneficial economically viable use for the property, and their consistency with the goals of CAFRA, N.J.S.A. 13:19-1 et seq., the Waterfront Development Law, N.J.S.A 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., in accordance with (g) below.

(e) In determining whether the property owner's investments in the property as a whole were reasonable, the Department shall evaluate the following information:

1. Conditions at the time of the investment. That is, the investment shall have been made in pursuit of development that would likely have been legally and practically possible on the property, considering all constraints existing and reasonably ascertainable at the time of the investment. For example, if a property owner bought land containing a dune that is regulated under this chapter, it would not be reasonable to assume that the property could be developed without constraints. In determining conditions at the time of the investment, the Department shall consider, at a minimum, the following:

- i. Existing zoning and other regulatory requirements and conditions;
- ii. Historic landmarks or other historic or cultural resources;
- iii. The likelihood of obtaining other necessary approvals such as wastewater treatment approvals or approvals from other local, state or Federal agencies;

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- iv. Terrain and other site conditions, and/or environmental constraints, which could affect the potential uses of the property as a whole;
  - v. The existence of, or likelihood of obtaining, services to the property such as sewers or electricity;
  - vi. Land uses on adjacent properties and in the area where the property is located;
2. Costs actually incurred in pursuit of development of the property as a whole ;
  3. Costs incurred in furtherance of a lawful action. For example, if the property owner began the project without the necessary permits, the cost of defending against an enforcement action for this violation would not constitute a reasonable investment;
  4. Costs relating only to the specific property as a whole that is the subject of the coastal permit application, and not including costs related to other properties; and
  5. Any other factor affecting the property or the property owner, which is related to the reasonableness of the investments and/or the proposed use of the property.

(f) In determining the minimum beneficial economically viable use of the property, the Department shall consider existing legal precedent at the time of the determination. A use shall not be excluded from consideration as a minimum beneficial economically viable use merely because it diminishes the value of the property as a whole, does not result in a profit, reduces the marketability of the property as a whole, or does not allow the property owner to recoup all reasonable investments identified under (e) above.

(g) In determining the environmental impacts of any minimum beneficial economically viable uses of the property and the consistency of those impacts with the goals of CAFRA, N.J.S.A.

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13:19-1 et seq., the Waterfront Development Law, N.J.S.A. 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., in accordance with (d) above, the Department shall evaluate whether the minimum beneficial economically viable use would:

1. Adversely affect the Special Areas described at N.J.A.C. 7:7E-3;
2. Result in irreversible losses of values and functions provided by coastal resources and whether such losses could be mitigated; and
3. Adversely affect public health, safety and welfare, and wildlife and marine fisheries.

(h) The Department shall not approve a minimum beneficial economically viable use as a result of the reconsideration of the application of a substantive standard of N.J.A.C. 7:7E under this section if that use would cause any one of the following:

1. Irreversible losses of values and functions of the coastal resources that provide essential breeding, spawning, nesting, feeding, resting, or wintering habitats for marine fish and wildlife, including migratory birds, endangered species, and commercially and recreationally important wildlife. For the purposes of this section, "irreversible losses" means an alteration to the coastal resource that would eliminate one or more of the essential characteristics which provides the breeding, spawning nesting, feeding, resting or wintering habitat for the species in question that could not be mitigated;
2. Irreversible losses in water quality, resulting in degradation of ground or surface waters, in violation of the Federal, State or local water quality standards; or

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3. Irreversible losses of wetlands and/or State open waters, providing essential flood and storm damage protection by absorption, the storage of water during high runoff periods and the reduction of flood crests, resulting in creation of a public nuisance.

(i) A property owner may request a reconsideration of application of a substantive standard(s) of N.J.A.C. 7:7E only after:

1. The conclusion of any administrative and/or judicial appeal of the permit decision; and
2. A court has determined that the issuance, modification, or denial of a coastal permit without reconsideration would result in a taking of property without just compensation.

[(e)] (j) A complete request for the [relaxation] reconsideration of N.J.A.C. 7:7E standards under

(c) above shall include the following items:

1. A completed LURP application form indicating a request for reconsideration and the type of permit being requested;
2. Documentation that the following public notice requirements have been met:
  - i. Verification as required under N.J.A.C. 7:7-4.2(a)3 that public notice has been provided to the clerk of the municipality, and as applicable under that paragraph, to the Pinelands Commission; and
  - ii. Verification that a certified mail notice and an 8 1/2 by 11 inch copy of the site plan and completed LURP application form have been forwarded to the construction official of the municipality in which the proposed development that is the subject of the reconsideration would occur, to the planning board and

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environmental commissions of the county in which the proposed development would occur, and to all owners of real property, including easements as shown on the tax duplicate, within 200 feet of the property or properties on which the proposed development would occur, along with a certified list of all owners of real property, including easements as shown on the tax duplicate, within 200 feet. The public notice shall follow the form provided by the Department, and shall state that a request for reconsideration has been submitted to the Department, that the request can be reviewed at the municipal clerk's office or at the Department, and that comments may be submitted to the Department within 15 days of receipt of the notice;

3. An environmental impact statement or compliance statement, providing the information necessary for the Department to evaluate the environmental impacts of the proposed minimum beneficial economically viable use in accordance with (f) and (g) above;

[1.] 4. Development plans showing the project that is proposed in order to provide a minimum beneficial economically viable use;

[2.] 5. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:7-1.3, was acquired [and] , the purchase price of the property as a whole and the instrument which documents the applicant's real property interest;

6. Document(s) showing the amount and nature and date of any [other expenditures] investments made to maintain and/or develop the property as a whole, other than the purchase price;

[3.] 7. The language of a proposed conservation restriction that meets the requirements of [(c)7 above] (n)2 below;

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[4.] 8. Documentation that the property has been offered for sale, in a letter following the form provided by the Department, [via certified mail, at a fair market value,] to all owners of [real] property, including easements as shown on the tax duplicate within 200 feet of the property as a whole, and to the land conservancies, environmental organizations, and governmental agencies on a list supplied by the Department. [The applicant shall submit any response it receives to the offer for sale to the Department within 15 days of receipt by the applicant.] This documentation shall include the following:

- i. A copy of each letter that the property owner sends under this subsection;
- ii. All responses the property owner receives to the letters sent under this subsection.  
Each response shall be submitted to the Department within 15 days after the property owner's receipt of the response; and
- iii. A list, certified by the municipality, of all owners of real property within 200 feet of the property as a whole, including owners of easements as shown on the tax duplicate;

9. The written offer of sale required under (j)8 above shall be sent by certified mail and shall:

- i. Indicate that the offer is open for a period of at least [180] 90 calendar days;
- ii. Include a copy of a fair market value appraisal, performed by a State-licensed appraiser, that assumes that a minimum beneficial economically viable use of the property would be allowed;

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- iii. [If applicable, include] Include full disclosure [that the property is comprised] of the location on the property and of any of the Special Areas described at N.J.A.C.

7:7E-3; and

- iv. Indicate that a [relaxation] reconsideration of N.J.A.C. 7:7E standards to [avoid extraordinary hardship and] allow development of the property has been requested under this section; [and]

[5.] 10. [Document(s) and a detailed narrative demonstrating compliance with (c) above,] A copy of a court determination that the Department's issuance, modification, or denial of a coastal permit would constitute a taking of property without just compensation; and

11. Documents showing that the property owner has concluded all administrative and judicial appeals of the Department's decision on the application for a coastal permit. Such documentation shall include the last of the following (submitted after the appeal period for the applicable decision has expired):

- i. A Department decision on the coastal permit application, made in accordance with the rules as strictly applied;
- ii. A final decision issued by the Commissioner regarding the Department's decision on the coastal permit application; or
- iii. Documentation that all appeals of any final decision issued by the Commissioner under (j)10ii above have been concluded.

(k) In the case where the Department initiates the reconsideration of application of the substantive standards of N.J.A.C. 7:7E under (c) above, the Department shall, upon initiation of the reconsideration process:



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1. Provide the following notifications:

- i. Publication in the DEP Bulletin;
- ii. In accordance with the requirements at N.J.A.C. 7:7-4.2(a)3; and
- iii. To those who provided comments on the previous application that is the subject of the reconsideration.

2. Include in the notice the applicant's name; project name, if applicable; project number; county and municipality of the project; and an executive summary describing the development that is the subject of the reconsideration.

3. Provide a 15-day comment period, commencing from the date of publication of the notice in the DEP Bulletin.

(l) If the Department determines to approve a development upon reconsideration of the application of the substantive standards of N.J.A.C. 7:7E, the Department shall provide notice of the development that the Department proposes to allow under the reconsideration following the same procedure as described in (k)1i above except that the Department shall provide a 30-day comment period, commencing from the date of publication of the notice in the DEP Bulletin.

(m) The Department shall complete the written analysis required under (d) above, which shall incorporate its decision on the request for reconsideration of the application of N.J.A.C. 7:7E standards as follows:

- 1. For a request for reconsideration under (c) and (i) above, no later than 180 days after receiving a complete request that meets all requirements at (j) above; or

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2. For a reconsideration initiated by the Department under (c) above, no later than 180 days from the publication of notice in the DEP Bulletin under (k) above.

(n) If the Department approves a development upon reconsideration of the application of the substantive standards of N.J.A.C. 7:7E under (c) above, the approval shall, at a minimum:

1. Be the minimum relief necessary to enable the property owner to realize a minimum beneficial economically viable use of the property as a whole, consistent with constitutional standards; and
2. Ensure that any part of the property as a whole that the Department does not allow to be developed upon reconsideration of the substantive standards of N.J.A.C. 7:7E under (c) above will be protected from future development by a recorded conservation restriction.

## N.J.A.C. 7:7A FRESHWATER WETLANDS PROTECTION ACT RULES

### SUBCHAPTER 1 GENERAL INFORMATION

#### 7:7A-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. Additional definitions specifically applicable to N.J.A.C. 7:7A-15, Mitigation, are set forth at N.J.A.C. 7:7A-15.1.

...

"Property as a whole" means all property assembled as one investment or to further one development plan. The property as a whole may include more than one municipal tax block or lot. The property as a whole may also include blocks or lots that were previously sold or

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developed, if those blocks or lots and the remaining unsold or undeveloped blocks or lots were part of one investment or development plan. In determining the property as a whole in a particular case, the Department shall consider existing legal precedent regarding what constitutes “property as a whole” at the time of the determination.

...

## SUBCHAPTER 7 INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

### 7:7A-7.2 Standard requirements for all individual permits

(a) (No change.)

(b) The Department shall issue an individual freshwater wetlands or open water fill permit only if the regulated activity:

1. - 11. (No change.)

12. Is in the public interest, as determined by the Department in consideration of the following:

i. - vi. (No change.)

[viii. The Department's evaluation of whether denial of the permit could result in a taking in accordance with N.J.A.C. 7:7A-7.3;]

13. - 14. (No change.)

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(c) The following shall apply to the Department's consideration of whether an alternative is practicable under (b)1 above[, or under N.J.A.C. 7:7A 7:7A-7.3(b)]:

1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes; [and]

i. In considering cost in accordance with (c)1 above, the Department shall consider the acquisition history of the property as a whole, as defined at N.J.A.C. 7:7A-1.4, and the amount, nature, and date of investments that the applicant has made in the property as a whole; and

2. An alternative shall not be excluded from consideration under this provision merely because it includes or requires an area not owned by the applicant which could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity.

[7:7A-7.3 Taking without compensation

(a) In determining whether a project is in the public interest pursuant to N.J.S.A. 13:9B-11 and N.J.A.C. 7:7A-7.2(b)12, the Department may, upon request of an applicant, evaluate whether denial of a permit could result in a taking of property without compensation.

(b) An application for an individual permit shall meet all applicable application requirements at N.J.A.C. 7:7A-10, including the requirement at N.J.A.C. 7:7A-10.6 for an alternatives analysis that meets the requirements at N.J.A.C. 7:7A-7.2. While an applicant may choose to also include

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in the application a takings assertion and information to support that assertion, the Department shall not accept the application as administratively complete if it includes only the takings information and does not include all other required application information, including the alternatives analysis.

(c) An applicant who asserts that the denial of a permit could result in a taking of property without compensation, and who wishes the Department to evaluate this assertion in making the determination in (a) above shall demonstrate that:

1. Denial of the permit would prevent the property owner from realizing a minimum beneficial use of the property as a whole, in accordance with constitutional standards; and
2. The inability to realize a minimum beneficial use under (c)1 above does not result from any action or inaction of the property owner or an entity controlled by the property owner.

(d) For the purposes of this section, the property as a whole is all property that was assembled as one investment or to further one development plan, and may include more than one municipal tax lot. The property as a whole may also include lots that were previously sold or developed, if those lots were part of one investment or development plan.

(e) To obtain an evaluation of whether the denial of a permit could constitute a taking of property without compensation as part of a determination of whether a project is in the public interest under (a) above, the applicant shall submit, at a minimum, the following information, in addition to the application requirements at N.J.A.C. 7:7A-10:

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1. Documentation showing when the property as a whole was acquired by the current property owner and for what consideration;
2. Documentation showing the amount, nature, date and reasonableness of any expenditures made to maintain and/or develop the property as a whole;
3. Documentation that the property has been offered for sale, through a letter whose form is provided by the Department, to all owners of property within 200 feet and to the land conservancies, environmental organizations, and government agencies on a list supplied by the Department. The applicant shall submit to the Department any response it receives to the offer for sale within 15 days of the applicant's receipt of the response;
4. The written offer of sale required under (e)3 above shall be sent by certified mail and shall:
  - i. Indicate that the offer is open for a period of at least 180 calendar days;
  - ii. Include a copy of a fair market value appraisal, performed by a State licensed appraiser, that assumes that a minimum beneficial use of the property will be allowed;
  - iii. Include full disclosure of the location on the property of any freshwater wetlands, transition areas, and/or State open waters; and
  - iv. Indicate that the property owner has applied for an individual freshwater wetlands permit and has asserted that the denial of that application will result in a taking of the property without compensation;
5. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands, transition areas, and/or State open waters;

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6. Documentation that the proposed project will cause the least environmental impact possible, while still providing a minimum beneficial use of the property consistent with constitutional standards; and
7. Documentation that the proposed project meets the standards at N.J.S.A. 13:9B-9(b)(3) through (9) and at N.J.A.C. 7:7A-7.2(b)2 through 12.]

## SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURE

### 7:7A-10.5 Additional application requirements for an individual transition area waiver

(a) (No change.)

(b) In addition to the information required at (a) above, the application checklist for a hardship transition area waiver under N.J.A.C. 7:7A-6.5 shall require the information required for an individual freshwater wetlands permit application at N.J.A.C. 7:7A-10.6(b).

### 7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

(a) In addition to the basic information required for all applications in N.J.A.C. 7:7A-10.2, the application checklist for an individual freshwater wetlands or open water fill permit shall require the following information:

1. - 6. (No change.)

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7. An alternatives analysis that [allows the Department to evaluate whether the requirements of N.J.A.C. 7:7A-7.2 are met, including:

- i. A description of all other alternatives considered and the reasons for rejecting them;  
and
- ii. A description of onsite alternatives considered in order to minimize impacts on the site.] meets the requirements at (b) below.

(b) To ensure that the Department can evaluate all potential alternatives to a proposed project, the application checklist for an individual freshwater wetlands permit shall require an alternatives analysis that allows the Department to evaluate whether the requirements of N.J.A.C. 7:7A-7.2 are met, including, at a minimum the following:

- 1. A description of all alternatives considered, including offsite alternatives as well as onsite alternatives that could minimize environmental impacts on the site, and the reasons for rejecting each alternative;
- 2. Information regarding the history of the property as a whole, as necessary to evaluate the cost to the property owner of various alternatives. Such information may include:
  - i. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:7A-1.4, was acquired and its purchase price;
  - ii. Documentation of any investments made to maintain and/or develop the property as a whole;
  - iii. Documentation of attempts by the property owner to sell the property or to obtain other property; and



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3. Documentation of the environmental impacts of the proposed project, and of ways to minimize those impacts.

## SUBCHAPTER 17 RECONSIDERATION BY DEPARTMENT OF ITS ACTION OR INACTION CONCERNING A PERMIT

### 7:7A-17.1 Reconsideration by Department of its action or inaction concerning a permit

(a) If the issuance, modification, or denial of an individual freshwater wetlands permit would constitute a taking without just compensation, and provided the conditions at (b) below are met, the Department may do any one or more of the following:

1. Compensate the property owner for the lost value of the property;
2. Condemn the affected property pursuant to the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq.; and/or
3. Reconsider and modify its action or inaction concerning a permit so as to minimize the detrimental effect to the value of the property.

(b) The Department may reconsider and modify its action or inaction concerning a permit so as to minimize the detrimental effect to the value of the property, provided:

1. The Department has rendered a decision on a permit application under the rules in this chapter as strictly applied;
2. All administrative and judicial appeals of the permit decision have been concluded; and
3. Either of the following requirements is met:

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- i. A court has determined that the issuance, modification, or denial of an individual freshwater wetlands permit would constitute a taking of property, and the property owner thereupon submits a request for a reconsideration and modification of the permit action or inaction; or
- ii. A takings complaint has been filed with the court or the court has determined that the issuance, modification or denial of a individual freshwater wetlands permit would constitute a taking of property, and the Department initiates the reconsideration.

(c) In making the determination to reconsider and modify its action or inaction concerning a permit so as to minimize the detrimental effect to the value of the property under (a) above, the Department shall prepare a written analysis that evaluates three factors:

- 1. The investments the property owner made in the property that is the subject of the individual freshwater wetlands permit application and whether the investments were reasonable, in accordance with (d) below;
- 2. The minimum beneficial economically viable use of the property, in accordance with (e) below; and
- 3. The environmental impacts of the minimum beneficial economically viable use for the property, and their consistency with the goals of the FWPA, in accordance with (f) below.

(d) In determining whether the property owner's investments in the property as a whole were reasonable, the Department shall evaluate the following information:

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1. Conditions at the time of the investment. That is, the investment shall have been made in pursuit of development that would likely have been legally and practically possible on the property, considering all constraints existing and reasonably ascertainable at the time of the investment. For example, if a property owner bought property containing freshwater wetlands regulated under this chapter, it would not be reasonable to assume that the property could be developed without constraints. In determining conditions at the time of the investment, the Department shall consider, at a minimum, the following:

- i.Existing zoning and other regulatory requirements and conditions;
- ii.Historic landmarks or other historic or cultural resources;
- iii.The likelihood of obtaining other necessary approvals such as wastewater treatment approvals or approvals from other local, state or Federal agencies;
- iv.Terrain and other site conditions, and/or environmental constraints, which could affect the potential uses of the property as a whole;
- v. The existence of, or likelihood of obtaining, services to the property such as sewers or electricity;
- vi. Land uses on adjacent properties and in the area where the property is located;

2. Costs actually incurred in pursuit of development of the property as a whole;

3. Costs incurred in furtherance of a lawful action. For example, if the property owner began the project without the necessary permits, the cost of defending against an enforcement action for this violation would not constitute a reasonable investment;

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4. Costs relating only to the specific property as a whole that is the subject of the individual freshwater wetlands permit application, and not including costs related to other properties; and

5. Any other factor affecting the property or the property owner, which is related to the reasonableness of the investments and/or the proposed use of the property.

(e) In determining the minimum beneficial economically viable use of the property, the Department shall consider existing legal precedent at the time of the determination. A use shall not be excluded from consideration as a minimum beneficial economically viable use merely because it diminishes the value of the property as a whole, does not result in a profit, reduces the marketability of the property as a whole, or does not allow the property owner to recoup all reasonable investments identified under (c) above.

(f) In determining the environmental impacts of any minimum beneficial economically viable uses of the property and the consistency of those impacts with the goals of the FWPA, in accordance with (c) above, the Department shall evaluate whether the minimum beneficial economically viable use would:

1. Adversely affect the quality and resource value classification of the wetland, pursuant to N.J.A.C. 7:7A-2.5, and the quantity of freshwater wetlands, transition areas, and/or State open waters to be disturbed;
2. Adversely affect other protected resources, for example, historic or cultural resources, ecologically unique areas or critical wildlife habitat;

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3. Result in irreversible losses of values and functions provided by freshwater wetlands, transition areas, and/or State open waters, for example, flood control, endangered species habitat, or water quality and whether such losses could be mitigated; and
4. Adversely affect public health, safety and welfare, and fish and wildlife.

(g) The Department shall not modify its action or inaction concerning a permit and approve a minimum beneficial economically viable use as the result of a reconsideration under this section if that use would cause any one of the following:

1. Irreversible losses of values and functions provided by freshwater wetlands, transition areas and/or State open waters that provide essential breeding, spawning, nesting, feeding, resting, or wintering habitats for fish and wildlife, including migratory birds, endangered species, and commercially and recreationally important wildlife. For the purposes of this section, "irreversible losses" means an alteration to the wetland, transition area or State open water that would eliminate one or more of the essential characteristics which provides the breeding, spawning nesting, feeding, resting or wintering habitat for the species in question, and that could not be mitigated;
2. Irreversible losses in water quality of FW-1 or FW-2 trout production waters and their tributaries, resulting in degradation of ground or surface waters, in violation of Federal, State or local water quality standards; or
3. Irreversible losses of wetlands and/or State open waters, providing essential flood and storm damage protection by absorption, the storage of water during high runoff periods and the reduction of flood crests, resulting in creation of a public nuisance.

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(h) A property owner may request that the Department reconsider and modify its action or inaction concerning a permit under (a) above only after:

1. The conclusion of any administrative and/or judicial appeal of the permit decision; and
2. A court has determined that the issuance, modification, or denial of an individual freshwater wetlands permit without reconsideration would result in a taking of property without just compensation.

(i) A complete request for the Department to reconsider and modify its action or inaction concerning a permit under (a) above shall include the following items:

1. A completed LURP application form, indicating a request for reconsideration and the type of permit being requested;
2. Unconditional written consent from the owner of the site, as defined at N.J.A.C. 7:7A-1.4, for Department representatives to enter the site to conduct site inspections;
3. Documentation that public notice has been given pursuant to the requirements at N.J.A.C. 7:7A-10.9(c), (d), (e) and (g);
4. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:7A-1.4, was acquired, the purchase price of the property as a whole and the instrument which documents the applicant's real property interest;
5. Document(s) showing the amount, nature, and date of any investments made to maintain and/or develop the property as a whole, other than the purchase price;

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6. The language of a proposed conservation restriction that meets the requirements of (m)2 below;

7. Documentation that the property has been offered for sale in a letter, following the form provided by the Department, to all owners of property within 200 feet of the property as a whole, and to the land conservancies, environmental organizations, and government agencies on a list supplied by the Department; and that no reasonable offer to purchase, that assumes a minimum beneficial economically viable use, has been received. This documentation shall include the following:

i. A copy of each letter that the property owner sends under this subsection;

ii. All responses the property owner receives to the letters sent under this subsection.

Each response shall be submitted to the Department within 15 days after the property owner's receipt of the response; and

iii. A list, certified by the municipality, of all owners of real property within 200 feet of the property as a whole, including owners of easements as shown on the tax duplicate;

8. The written offer of sale required under (i)7 above shall be sent by certified mail and shall:

i. Indicate that the offer is open for a period of at least 90 calendar days;

ii. Include a copy of a fair market value appraisal, performed by a State-licensed appraiser, that assumes that a minimum beneficial economically viable use of the property will be allowed;

iii. Include full disclosure of the location on the property of any freshwater wetlands, transition areas, and/or State open waters; and

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- iv. Indicate that the property owner has requested a reconsideration of the Department's action or inaction concerning a permit under this section; and
- 9. A development plan showing the project that is proposed in order to provide a minimum beneficial economically viable use;
- 10. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, or other features on the site relevant to determining compliance with the requirements of this chapter;
- 11. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands, transition areas, and/or State open waters;
- 12. Documentation that the proposed project will cause the least environmental impact possible, while still providing a minimum beneficial economically viable use of the property consistent with constitutional standards;
- 13. A copy of the court determination that the Department's issuance, modification, or denial of an individual freshwater wetlands permit would constitute a taking without just compensation; and
- 14. Documents showing that the property owner has concluded all administrative and judicial appeals of the Department's decision on the application for an individual freshwater wetlands permit. Such documentation shall include the last of the following (submitted after the appeal period for the applicable decision has expired):
  - i. A Department decision on the application for an individual freshwater wetlands permit, made in accordance with the rules as strictly applied;
  - ii. A final decision issued by the Commissioner regarding the Department's decision on the application for an individual permit; and



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iii. Documentation that all appeals of any final decision issued by the Commissioner under (i)14ii above have been concluded; and

15. The names and addresses of all consultants, engineers, and other persons providing technical assistance in preparing the request for reconsideration.

(j) In the case where the Department initiates the reconsideration of whether to modify its action or inaction concerning a permit under (a) above, the Department shall, upon initiation of the reconsideration process:

1. Provide the following notifications:

i. Publication in the DEP Bulletin;

ii. In accordance with the requirements at N.J.A.C. 7:7A-10.9(c)(d)(e)1-4, and 6; and

iii. To those who provided comments on the previous application that is the subject of the reconsideration.

2. Include in the notice the applicant's name; project name, if applicable; project number; county and municipality of the project; and an executive summary describing the development that is the subject of the reconsideration.

3. Provide a 15-day comment period, commencing from the date of publication of the notice in the DEP Bulletin.

(k) If the Department determines to approve a development upon reconsideration under this section, the Department shall provide notice of the development that the Department proposes to allow under the reconsideration following the same procedure described at (j) above except that

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the Department shall provide a 30-day comment period commencing from the date of notice in the DEP Bulletin.

(l) The Department shall complete the written analysis required under (c) above, which shall incorporate its decision on the request for reconsideration and modification of its action or inaction concerning a permit, as follows:

1. For a request for reconsideration under (b) and (h) above, no later than 180 days from the Department's receipt of a complete request under (h) above; or
2. For a reconsideration initiated by the Department under (b) above, no later than 180 days from the publication of notice in the DEP Bulletin under (j) above.

(m) If the Department approves a development upon reconsideration and modification of its action or inaction concerning a permit under (a) above, the approval shall, at a minimum:

1. Be the minimum relief necessary to enable the property owner to realize a minimum beneficial economically viable use of the property as a whole, consistent with constitutional standards; and
2. Ensure that any part of the property as a whole that the Department does not allow to be developed upon reconsideration and modification of its action or inaction concerning a permit will be protected from future development by a recorded conservation restriction.

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994), permit

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the public to understand accurately and plainly the purpose and expected consequences of these proposed amendments, I hereby authorize this proposal.

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Date

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BRADLEY M. CAMPBELL  
Commissioner